(12)

No. 98-6322

In The

Supreme Court of the United States

October Term, 1998

ANTONIO T. SLACK,

Petitioner,

v.

E.K. McDANIEL, Warden, Ely (Nevada) State Prison, and FRANKIE SUE DEL PAPA, Attorney General of the State of Nevada,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE FEDERAL DEFENDERS ASSOCIATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

This Court granted certiorari limited to the following question:

Where a state prisoner's initial federal habeas corpus petition (28 U.S.C. §2254) is dismissed for failure to exhaust state remedies and where he subsequently exhausts state remedies and refiles a federal petition, whether claims included within the second petition that were not included within the initial §2254 filing constitute "second or successive" habeas applications.

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BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE FEDERAL DEFENDERS ASSOCIATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICI*

The National Association of Criminal Defense Lawyers is a District of Columbia non-profit corporation with a membership of more than 10,000 attorneys nationwide — along with 78 state and local affiliate organizations numbering 28,000 members in fifty states. NACDL was founded in 1958 to promote study and research in the field of criminal defense law, to disseminate and advance knowlege of the law in the area of criminal justice and practice, and to encourage the integrity, independence and expertise of defense lawyers in criminal cases. Foremost among NACDL's objectives is to promote the proper administration of justice. It has appeared before this Court as *amicus curiae* on many occasions. *See, e.g., Stewart v. Martinez-Villareal*, 118 S.Ct. 1618 (1998); *Hohn v. United States*, 118 S.Ct. 1969 (1998).

The Federal Defenders Association was formed in 1995 to enhance the representation provided under the Criminal Justice Act (18 U.S.C. §3006A) and the Sixth Amendment to the Constitution of the United States. The Association is a non-profit volunteer organization whose membership includes attorneys and support staff of Federal Defenders offices nationwide. One of FDA's missions is to file *amicus curiae* briefs to ensure that the position of indigent defendants in the criminal justice system is properly represented.[1]

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1 Both parties have consented to the appearance of NACDL and FDA as *amicus curiae* in this matter. No counsel for any party has authored this brief in whole or in part, and no person or entity, other than *amici*, has made a monetary contribution to the preparation or submission of this brief. Sup. Ct. Rule 37.6.

SUMMARY OF ARGUMENT

A renewed federal habeas corpus petition may not be classified as "second or successive" or dismissed as an abuse of the writ where the earlier federal petition was dismissed without prejudice on procedural grounds (e.g., lack of total exhaustion) and received no merits adjudication. This Court's earlier decision in *Rose v. Lundy*, 455 U.S. 509 (1982), which directs the federal courts to dismiss habeas petitions containing exhausted and unexhausted claims, clearly contemplated that habeas litigants would be free to return to the federal courts to secure merits adjudication of their federal claims once they had first presented all of their claims to the state courts.

This Court's recent decision in *Stewart v. Martinez-Villareal*, 118 S.Ct. 1618 (1998), handed down subsequent to a contrary Ninth Circuit decision on which the lower courts relied in this case, holds squarely that dismissal of a prior federal habeas petition for nonexhaustion was without prejudice to filing a new federal petition once exhaustion is complete. Moreover, dismissal without prejudice for nonexhaustion does not render a subsequent habeas petition "second or successive" as that term is defined in Habeas Rule 9(b) or newly-amended §2244(b), as modified by AEDPA. The definition of "second or successive" retains its prior meaning under the new habeas provisions. Under either statutory regime, the renewed habeas application filed here does not qualify as "second or successive" or constitute an abuse of the writ.

ARGUMENT

A RENEWED FEDERAL HABEAS CORPUS PETITION MAY NOT BE CLASSIFIED AS "SECOND OR SUCCESSIVE" OR DISMISSED AS AN ABUSE OF THE WRIT WHERE THE EARLIER FEDERAL PETITION WAS DISMISSED WITHOUT PREJUDICE ON PROCEDURAL GROUNDS (E.G., LACK OF TOTAL EXHAUSTION) AND RECEIVED NO MERITS ADJUDICATION

In *Rose v. Lundy*, 455 U.S. 509 (1982), this Court ruled that a federal habeas corpus petition that contained both exhausted and unexhausted claims — what it denominated a "mixed petition" — should be subject to a rule of "total exhaustion"; *viz.* the federal petition should be dismissed in its entirety to allow the habeas litigant an opportunity to return to the state courts to present these new claims in the first instance. *Id.* at 520-22. *Lundy* nonetheless contemplated that the habeas petitioner ultimately would return to the federal courts for merits adjudication of his now-exhausted federal claims.

Antonio Slack's initial federal habeas petition was dismissed in 1992 "without prejudice" for nonexhaustion, with the district court granting him leave "to file an application to renew upon exhaustion of all state remedies." After pursuing post-conviction relief in the Nevada state courts, he returned to the federal district court in 1995, filing an amended habeas corpus petition containing the claims he had recently presented to the state post-conviction courts along with the claims

previously raised in his original 1991 federal filing.[2]

The district court, however, dismissed four of his claims with prejudice because they had not been previously raised in his original (and unadjudicated) federal petition. Finding these newly-asserted claims to be an "abuse of the writ" under Rule 9(b) of the Rules Governing Section 2254 Proceedings in the United States District Courts and *McCleskey v. Zant*, 499 U.S. 467 (1991), the district court placed principal reliance on the Ninth Circuit's decision in *Farmer v. McDaniel*, 98 F.3d 1548 (9th Cir. 1996), which held, for the first time among the courts of appeals nationwide, that a renewed federal habeas petition could be rejected as an abuse of the writ even though the earlier petition had been dismissed without prejudice for failure to exhaust state remedies and had not received merits review in any respect. *See id.* at 1561-63 (Schroeder, J., concurring in part and dissenting in part).

Notwithstanding *Farmer* or AEDPA's recent amendment of 28 U.S.C. §2244(b), relating to "second or successive" habeas corpus applications, this Court's subsequent decision in *Stewart v. Martinez-Villareal*, 118 S.Ct. 1618 (1998) has effectively rendered *Farmer* dead letter. *Martinez-Villareal* held specifically that dismissal of prior federal habeas petitions for lack of exhaustion did not make any renewed post-exhaustion federal petition "second or successive", as defined by Rule 9(b) of the §2254 Habeas Rules

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2 It should be noted that the amended federal petition was filed in 1995, prior to the enactment of the Antiterrorism and Effective Death Penalty Act of 1996, which made significant changes in various provisions of the federal habeas corpus statutes. Accordingly, this case must be considered under the pre-AEDPA standards. *See Lindh v. Murphy*, 521 U.S. 320, 322-23 (1997). Nonetheless, the changes AEDPA made, in particular to 28 U.S.C. §2244(b), do not affect the disposition or outcome of this case.

or newly-amended §2244(b). Moreover, the *Farmer* court's idiosyncratic definition of "second or successive" cannnot stand because the amended version of §2244(b), enacted by AEDPA, retains the same definition of "second or successive" as that contained in unamended Habeas Rule 9(b), which was unchanged by AEDPA.

Prior to the enactment of AEDPA, the caselaw construing former §2244(b) recognized several situations in which a habeas petition that was numerically "second or successive" could not be subjected to the restrictive rules governing successive petitions. In particular, where the earlier petition did not, or could not, produce a judgment on the merits, any second petition subsequently filed was not properly classified as a second or succesive petition. *See* 2 James S. Liebman & Randy Hertz, *Federal Habeas Corpus Practice and Procedure* §28.3b at 1163 & nn.16-17 (3d ed. 1998).

Indeed, this Court noted that AEDPA preserved the pre-existing law's recognition that an earlier federal petition not resolved on the merits is not ordinarily subject to statutory or common law restrictions upon successive petitions. *Martinez-Villareal*, 118 S.Ct. at 1621-22 (treating pre-AEDPA law as applicable and dispositive of issue whether refiling of claims previously dismissed for nonexhaustion is "successive" under AEDPA). The Court explained (*id.* at 1622):

> [N]one of our cases ... ha[s] ever suggested that a prisoner whose habeas petition was dismissed for failure to exhaust state remedies, and who then did exhaust those remedies and returned to federal court, was by such action filing a successive petition. A court where such a petition was filed could adjudicate these claims under the same standard as would govern those made in any other first petition.

The Court in *Martinez-Villareal* was considering a refiled execution-competence claim after a previous filing had been dismissed for prematurity rather than nonexhaustion. Nonetheless, the Court explained that the same rationale for permitting unrestricted refiling after dismissal for nonexhaustion applied as well to other "dismissal[s] of a first petition for technical procedural reasons" (*id.* at 1622):

> [I]n both situations [dismissals for nonexhaustion or prematurity], the habeas petitioner does not receive an adjudication of his claim. To hold otherwise would mean that a dismissal of a first habeas petition for technical procedural reasons would bar the prisoner from ever obtaining federal habeas review.

This Court's ruling in *Martinez-Villareal* thus effectively ratified the decisions of the lower courts, which, with virtual unanimity, have come to the same conclusion, with respect to both pre- and post-AEDPA §2244(b). *See* Liebman & Hertz §28.3b and text accompanying nn.28-37 (collecting cases). *See also In re Wilson*, 142 F.3d 939, 940 (6th Cir. 1998)("Recently, this court joined every other court to consider the question and held that a habeas petition filed after a previous petition was dismissed without prejudice for failure to exhaust state remedies is not a 'second or successive' petition ..." (collecting cases)); *Carlson v. Pitcher* 137 F.3d 416, 419 (6th Cir. 1998)("every court addressing the issue since AEDPA took effect has held that a habeas petition filed after a prior petition is dismissed without prejudice for failure to exhaust state remedies does not qualify as a 'second or successive' application within the meaning of §2244(b)(1)" (citing cases)); *McWilliams v. Colorado*, 121 F.3d 573, 575 (10th Cir. 1997)(court "accept[s] the view espoused by every circuit that has considered this issue since enactment of the [AEDPA]: a

habeas petition filed after a prior petition is dismissed without prejudice for failure to exhaust state remedies does not qualify as a 'second or successive' application within the meaning of 2244(b)(1)"); *In re Gasery*, 116 F.3d 1051, 1052 (5th Cir. 1997)("[a]lthoughthe AEDPA's amendment to §2244 imposes stricter requirements for 'second or successive' petitions than the pre-AEDPA 'abuse of the writ" standard in [Habeas] Rule 9(b), nothing in the AEDPA affects the determination of what constitutes a 'second or successive' petition' as that phrase is used in amended section 2244; court accordingly relies on pre-AEDPA caselaw decided under Habeas Rule 9(b) to conclude that new petition filed after previous petition had been dismissed for lack of exhaustion did not constitute 'second or successive' petition"); *Christy v. Horn*, 115 F.3d 201, 208 (3d Cir. 1997)(accord); *Benton v. Washington*, 106 F.3d 162, 164-65 (7th Cir., 1996)("1996 legislation ... preserves the concept of the 'second or successive petition' ... [and] [t]hose words retain the meaning they had under Rule 9(b)"); *In re Turner*, 101 F.3d 1323, 1323 (9th Cir. 1996)("We hold that section 2244 does not apply to second or subsequent habeas petitions where the first petition was dismissed without prejudice for failure to exhaust state remedies ..."); *Dickinson v. Maine*, 101 F.3d 791 (1st Cir. 1996)(accord); *see especially Camarano v. Irvin*, 98 F.3d 44, 46-47 (2d Cir. 1996)(earlier habeas petition dismissed for nonexhaustion: " because application of [section 2244(b)'s] gatekeeping provisions to deny a resubmitted petition in cases such as this would effectively preclude any federal habeas review ... a dismissal without prejudice can have no preclusive effect on subsequent petitions").

This Court long ago recognized that it should avoid reading statutes in a manner that produces absurd results. *Rowland v. California Men's Colony*, 506 U.S. 194, 200 n.3 (1993). Here, the Court does not have to engage in reading language in a manner that "does least violence to the text"

because there is a reasonable interpretation of §2244(b) that avoids any absurdity and does no violence to the text — that is, the section must be read to bar only those claims raised and determined on the merits in a prior federal habeas application.

A contrary reading would mean that, whenever a federal court dismissed a habeas application raising unexhausted claims, those claims would be barred forever. *See Rose v. Lundy*, 455 U.S. at 522 ("[A] district court must dismiss habeas petitions containing both exhausted and unexhausted claims"). Yet Congress implicitly has directed the contrary result in newly-enacted §2254(b)(2). After codifying the exhaustion rule in §2254(b)(1), Congress stated that "[a]n application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State". 28 U.S.C. §2254(b)(2). By using the word "may", Congress authorized dismissal for failure to exhaust — as opposed to "denial on the merits" — with a clear expectation that the dismissed applicant late would file a subsequent federal application containing newly-exhausted claims that did not warrant "denial on the merits" in their unexhausted state. This subsequent application, though numerically second, could not be a "second or successive" application barred by §2244(b). *See Martinez-Villareal*, 118 S.Ct. at 1625 (Thomas, J., dissenting)("Claims presented in a petition dismissed for failure to exhaust are neither 'determined' nor 'adjudicated.' * * * In [that] situation, the federal court dismisses the unexhausted petition without prejudice, *see Rose v. Lundy*, 455 U.S. 509, 520-22 (1982), so it could be argued that the petition should be treated as if it had never been filed").

The term 'second or successive" did not come to the AEDPA devoid of history or prior meaning in the habeas context. Both Habeas Rule 9(b) and pre-AEDPA case law

defined "second or successive". *See Kuhlmann v. Wilson*, 477 U.S. 436, 444 n.6 (1986)(plurality opinion); *McCleskey v. Zant*, 499 U.S. at 487 (quoting Habeas Rule 9(b)). In passing AEDPA, Congress presumably was aware of the meaning of "successive" in the context of habeas proceedings. "It is always appropriate to assume that our elected representatives, like other citizens, know the law." *Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979)(relying on prior judicial interpretation of statutory language in Title VI to inform interpretation of Title IX).

When Congress enacted AEDPA, it took into account possible conflicts with codified rules, and it amended Habeas Rules inconsistent with the new law to make them consistent with AEDPA. *See, e.g.*, FRAP Rule 22, amended to conform to the new appellate-certification requirements of newly-amended 28 U.S.C. §2253. Congress did not, however, amend Habeas Rule 9(b), finding it otherwise consistent with AEDPA. The only reasonable conclusion is that Congress intended the courts to continue treating certain subsequent petitions as if, legally, they were first petitions because their claims, exhausted or unexhausted, had not been "determin[ed] ... on the merits ..." Habeas Rule 9(b).

In the absence of a specific definition in §2244, this Court should look to the fact that Congress left intact the Rule 9(b) language defining a successive petition as one that was previously determined on the merits. Nothing in the text or legislative history of AEDPA suggests that Congress intended to alter this distinct meaning of the term. This Court has said that "[w]here Congress has not expressly declared a word to have a particular meaning, it will be presumed to have used the word in its well-understood public and judicial meaning." *Toxaway Hotel Co. v. Smathers & Co.*, 216 U.S. 439 (1910); *see also Ankenbrandt v. Richards*, 504 U.S. 689, 700-01

(1992)(applying same rule where Congress re-enacts a statute after this Court has interpreted the language of the former provision).

Based upon this well-established meaning of "second or successive", the courts of appeals uniformly have held that §2244(b) does not apply to now properly-exhausted subsequent habeas applications where a prior federal petition had been dismissed without prejudice — or merits consideration — for failure to exhaust state remedies. That was precisely the holding of the Ninth Circuit which this Court affirmed in *Martinez-Villareal* (118 F.3d 628, 632-33 (9th Cir. 1997)):

> In *In re Turner*, we concluded that "section 2244 does not apply to second or subsequent habeas petitions where the first was dismissed without prejudice for failure to exhaust state remedies". 101 F.3d 1323, 1323 (9th Cir. 1996). The Second Circuit arrived at the same conclusion in *Camarano v. Irvin*, 98 F.3d 44 (2d Cir. 1996). The *Camarano* court confronted the question of "whether a habeas petition qualifies as a 'second or successive' application within the meaning of §2244, where it is filed after a prior petition is dismissed without prejudice for failure to exhaust state remedies". *Camarano*, 98 F.3d at 46. The court concluded that "because application of the gatekeeping provisions [of §2244] to deny a resubmitted petition in cases such as this would effectively preclude any federal habeas review ... a dismissal without prejudice can have no preclusive effect on subsequent petitions." *Id.* at 46-47; *see also Christy v. Horn*, 115 F.3d 201 (3d Cir. 1997).

Under the circumstances, then, it is manifest that the courts below, in reliance upon the Ninth Circuit's misinterpretation of §2244 in *Farmer*, have mistakenly conflated failure to exhaust with procedural default in assessing the consequences of asserting newly-exhausted claims in a subsequent habeas application where the earlier petition had not received merits consideration. The doctrine of exhaustion and that of the independent and adequate state procedural ground are distinct and have differing repercussions. Both doctrines involve situations in which a failure to present a claim in the state courts bars granting relief in federal courts. The procedural default doctrine ultimately bars habeas relief on the merits. *Coleman v. Thompson*, 501 U.S. 722 (1991). The exhaustion doctrine, on the other hand, is merely an ordering device. *Granberry v. Greer*, 481 U.S. 129 (1987). Exhaustion never wholly forecloses, but only postpones, federal consideration on the merits. *See* Liebman & Hertz §23.1 and text accompanying nn.21-25. *See also Boerckel v. O'Sullivan*, 134 F.3d 1194, 1196-97 (7th Cir.), *cert. granted on other grounds*, 119 S.Ct. 508 (1998)(exhaustion and procedural default doctrines "are distinct and have different ramifications").

Accordingly, this Court should adhere to its decision in *Martinez-Villareal* and reaffirm that where a prior federal habeas petition has been dismissed for failure of total exhaustion, in conformance with *Rose v. Lundy*, any subsequent federal petition with newly-exhausted claims — whether or not those claims were asserted in the earlier abortive federal petition — should receive merits consideration as a first federal petition, and not be subject to dismissal as a "second or successive" petition. To the extent that *Farmer* is to the contrary, it should be overturned.

CONCLUSION

The order of the court of appeals should be vacated and this case remanded for further proceedings in accordance with a determination that a habeas corpus application cannot be dismissed as "second or successive" where the initial petition was dismissed without prejudice for failure to exhaust state remedies.

Respectfully submitted,

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